BRENNAN CENTER FOR JUSTICE
AT NYU SCHOOL OF LAW

Testimony of
ADAM H. MORSE
Associate Counsel, Democracy Program
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
before the
NEW YORK CITY CAMPAIGN FINANCE BOARD
Hearing on
"Doing Business"

January 31, 2005

The Brennan Center for Justice at NYU School of Law is pleased to submit this testimony on potential restrictions on contributions to candidates for City office from government contractors. The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Center's mission is to develop and to implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms.

The Center's Democracy Program has been working in the area of campaign finance reform on the federal, state, and local levels since its inception in 1995. The Center was part of the legal team that successfully defended the federal Bipartisan Campaign Reform Act of 2002's electioneering communications provisions and soft money bans in *McConnell v. FEC*, 540 U.S. 93 (2003). Center attorneys have successfully helped to defend numerous challenges to state campaign finance laws throughout the country, including *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); *Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000), and *May v. Bayless*, 55 P.3d 768 (Ariz. 2002) (*en banc*). The Center also provides legal counsel and legislative drafting assistance to citizens and elected officials interested in promoting campaign finance bills or initiatives and has delivered testimony on campaign finance issues before Congress and state legislatures. In addition, the Center has published four editions of *Writing Reform: A Guide to Drafting State & Local Campaign Finance Laws*, which provides comprehensive constitutional analysis of a wide range of campaign finance provisions.

The Brennan Center applauds the Campaign Finance Board's decision to focus attention on the dangers inherent in campaign contributions from individuals who stand to benefit directly from government contracting decisions. While disclosure is an important first step, the City should go further and end the threat of "pay-to-play" altogether, by imposing an outright ban on campaign contributions from government

contractors, at least to candidates who participate in the voluntary public funding system. Because contributions from government contractors present a severe risk of engendering corruption or the appearance of corruption, courts have generally upheld the constitutionality of bans on contributions from government contractors and from corporations and individuals working in highly-regulated industries. Bans on contributions by government contractors to participants in a voluntary public financing system raise even less substantial constitutional questions. The difficult questions in banning pay-to-play are implementation questions.

I. Courts Generally Uphold Narrow Bans.

While no court whose decisions are binding on New York City has directly addressed the constitutionality of bans on campaign contributions from government contractors, the weight of precedent supports the constitutionality of such bans. The Supreme Court's reasoning in *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), and subsequent campaign finance cases supports regulations that are narrowly drawn to address a clear danger of corruption or the appearance of corruption. Other courts, including a United States Court of Appeals and several state Supreme Courts, have upheld complete bans on campaign contributions from individuals whose employment raises particularly high concerns of corruption.

The Supreme Court's decision in *Buckley* provides the basic framework for considering the constitutionality of contribution limits. While the Court acknowledged that limits on contributions implicate associational rights, it also noted that "[e]ven a significant interference with protected rights may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25 (internal quotation marks and citations omitted). The Court agreed that limiting "the actuality and appearance of corruption" justified $1,000 contribution limits. *Id.* at 26.

Subsequent Supreme Court decisions have elaborated on this reasoning. In *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 391 (2000), the Court held:

> The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.

The danger of corruption posed by contributions from contractors who seek to obtain government business is similarly "neither novel nor implausible." And even if no actual instances of *quid pro quos* exist—a supposition rendered unlikely by the numerous examples of corrupt deals around the country and the recent scandals in both New Jersey and Connecticut—the public's perception of corruption based on "pay to play" is sufficient to justify regulation.

161 AVENUE OF THE AMERICAS, 12TH FLOOR • NEW YORK, NY 10013 • 212 998 6730 • FAX 212 995 4550 • www.brennancenter.org

Furthermore, the Supreme Court's most recent statement on campaign finance law stressed the importance of deferring to the legislature's judgment on contribution limits:

> The less rigorous standard of review we have applied to contribution limits . . . shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process.

McConnell v. FEC, 540 U.S. 93, 137 (2003).

Most courts that have considered "pay to play" contribution bans have upheld those regulations. *See, e.g., Blount v. SEC*, 61 F.3d 938, 944-48 (D.C. Cir. 1995) (upholding constitutionality of SEC regulations that prohibit municipal finance underwriters from making campaign contributions to politicians who award government underwriting contracts); *Casino Ass'n of Louisiana v. State*, 820 So. 2d 494 (La. 2002), *cert. denied*, 529 U.S. 1109 (2003) (upholding ban on contributions from riverboat and land-based casinos); *Gwinn v. State Ethics Comm'n*, 426 S.E.2d 890 (Ga. 1993) (upholding ban on contributions by insurance companies to candidates for Commissioner of Insurance); *Soto v. State*, 565 A.2d 1088 (N.J. Super. Ct. App. Div. 1989) (upholding ban on political contributions from casino employees); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61 (Ill. 1976) (upholding ban on contributions from members of liquor industry). The Court of Appeals for the D.C. Circuit, in upholding the SEC's ban on campaign contributions from bond underwriters, noted that "the risk of corruption is obvious and substantial." *Blount*, 61 F.3d at 945. The court also observed that in order to uphold the regulations, "no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth great, and the legislative purpose prophylactic." *Id.* Similar rules generally banning contributions from registered lobbyists have also been upheld. *See State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999); *Institute of Gov'tal Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183 (E.D. Cal. 2001).

While some courts have struck down pay-to-play bans, *see, e.g., Penn v. Foster*, 751 So. 2d 823 (La. 1999) (per curiam) (invalidating ban on contributions from members of the gambling industry), *cert. denied sub nom. Louisiana v. Penn*, 529 U.S. 1109 (2000); *Lee v. Commonwealth*, 565 S.W.2d 634 (Ky. Ct. App. 1978) (invalidating ban on property owner contributions to candidates for property tax assessor, based on state Constitution), the weight of precedent, both in terms of number of courts and in the quality of the courts' reasoning, supports upholding these regulations. Furthermore, more recent decisions tend to be more supportive of pay-to-play bans than older decisions. *Compare Casino Ass'n of Louisiana*, 820 So. 2d 494 (decided in 2002), *with Penn*, 751 So. 2d 823 (decided by the same court in 1999). While bans on campaign contributions by government contractors are likely to face court challenges, they are likely to be upheld.

161 AVENUE OF THE AMERICAS, 12TH FLOOR • NEW YORK, NY 10013 • 212 998 6730 • FAX 212 995 4550 • www.brennancenter.org

II. The Government May Condition Public Financing on Accepting Additional Limitations.

While the City can constitutionally apply "pay-to-play" restrictions to all candidates, the constitutional authority for imposing such restrictions on participating candidates is even stronger. One of the basic principles of public financing programs is that the government may condition the availability of public funds on the acceptance of additional restrictions, including restrictions that would be unconstitutional if imposed on candidates who did not accept public financing. The most common additional restriction is a limit on expenditures by participating candidates. *See, e.g.,* N.Y.C. Admin. Code § 3-706(a). The *Buckley* Court upheld the application of an expenditure limit to candidates who participate in the voluntary presidential public financing system at the same time as it invalidated mandatory expenditure limits. *Buckley*, 424 U.S. at 57. Public financing systems also frequently require participating candidates to decline contributions from certain entities that would otherwise be permitted to make contributions. For example, participating candidates in the City's matching fund program were prohibited from accepting contributions from corporations years before the City Council extended that restriction to all candidates. N.Y.C. Admin. Code § 3-703(l); Local Law No. 60 of 2004. Other public financing systems limit participating candidates to contributions from individuals who would be entitled to vote for the candidate—a limit that would not be upheld if applied to all candidates regardless of public funding. The acceptance of public funding thus creates an additional layer of constitutional protection for the application of "pay-to-play" restrictions to participating candidates.

III. Implementation Questions

I would like to conclude with a few comments on implementing "pay-to-play" restrictions. The City should prohibit all candidates for City office from accepting contributions from city contractors. If the City limits the restriction to participating candidates, the Brennan Center urges an absolute ban on contributions from city contractors to participating candidates, rather than simply eliminating matching funds for contributions from contractors.

The Board requested comments on whether an increased incentive should be offered to counterbalance the increased restriction. No increased incentive will be necessary if the restriction applies to all candidates, regardless of participation in the public financing system. If the City limits any restrictions to participating candidates, the issue of whether to provide an increased incentive becomes important. Resolving this question depends on the empirical question of whether candidates receive so much money from contractors that some might opt out of the system rather than give up those contributions. If contributions from contractors are not a large portion of the overall contributions to participating candidates, then no adjustment to the match rate would be necessary to counterbalance the additional restriction. In any event, any additional benefit should be in the form of an increased match rate, not an increased contribution limit.

161 AVENUE OF THE AMERICAS, 12TH FLOOR • NEW YORK, NY 10013 • 212 998 6730 • FAX 212 995 4550 • www.brennancenter.org

Defining the coverage of a pay-to-play provision can be difficult. Efforts at circumvention are likely, and any successful regulation must include important employees of government contractors, individuals who own significant portions of firms contracting with the government, and the spouses and immediate family members of those individuals. Contribution bans should apply to all candidates for City office, to prevent efforts to curry favor by contributing to the political allies of a government official who may more directly control the contracting process. At the same time, the City should be aware that extending the reach of the regulations may increase the danger that a court would find them unconstitutional. Once the Board has drafted specific proposed amendments, the Brennan Center would be happy to provide further analysis and comments.

Should the Board have any questions about our analysis, inquiries may be directed to Associate Counsel Adam Morse (212-992-8648; adam.morse@nyu.edu).

Respectfully submitted,

Adam H. Morse
Associate Counsel, Democracy Program

161 AVENUE OF THE AMERICAS, 12TH FLOOR • NEW YORK, NY 10013 • 212 998 6730 • FAX 212 995 4550 • www.brennancenter.org